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In The Supreme Court of The United States

OCTOBER TERM, 1943

No. 98

SARAH PRINCE, *Appellant*

vs.

COMMONWEALTH OF MASSACHUSETTS, *Appellee*

BRIEF ON BEHALF OF THE APPELLEE THE COMMONWEALTH OF MASSACHUSETTS

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No. 98

SARAH PRINCE, *Appellant*

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COMMONWEALTH OF MASSACHUSETTS, *Appellee*

BRIEF ON BEHALF OF THE APPELLEE THE COMMONWEALTH OF MASSACHUSETTS

STATEMENT OF THE CASE

The appellant, Sarah Prince, was originally arraigned before the District Court of Brockton, Massachusetts, on January 5, 1942, charged, upon complaint duly made, with the violation of Massachusetts General Laws (Ter. Ed.) Chapter 149, sections 80 and 81 as amended by Statute 1939, Chapter 461, section 7. The appellant pleaded "not guilty" and, being put to trial on January 19, 1942, was found guilty by the said District Court and a fine of $10.00 imposed on each complaint. From this judgment the appellant appealed to the Superior Court for Plymouth County. The case came on to be heard in the said Superior Court on February 10, 1942. The appellant again pleaded "not guilty" to each complaint and waived her right to

trial by jury. On February 11, 1942, at the completion of the trial the appellant was found guilty on each complaint and a fine of $10.00 was imposed on each complaint.[1]

The appellant moved to dismiss and/or quash before trial, at the conclusion of the Commonwealth's case, and again at the close of all the evidence; said motions on each occasion being overruled and exceptions saved by the appellant. The appellant also made motions for a directed finding and for rulings which likewise were denied.[2] On February 17, 1943, the appellant's exceptions to the judgment and sentence were overruled and the statutes here in question were held to be constitutional by the Massachusetts Supreme Judicial Court in an opinion officially published: *Commonwealth* v. *Prince*, 1943 Mass. Adv. Sheets p. 233, 46 N. E. (2nd) 755, Record page 75 *et seq.*

STATEMENT OF FACTS

At the outset it appears to the appellee to be desirable to attempt to eliminate the confusion caused by various allegations of facts intermingled with conclusions of law, which have been made on behalf of the appellant with respect to the facts dealt with by the Massachusetts courts. The appellee, therefore, respectfully calls to the attention of this Court the following facts.

The appellant was complained of in the District Court of Brockton, Massachusetts, for a violation of Massachusetts General Laws (Ter. Ed.) Chapter 149, sections 80 and 81.

[1] Record p. 3. The appellant was also convicted in the lower courts on a complaint charging violation of section 79 (refusal to disclose identity of offending minor) of General Laws (Ter. Ed.) Chapter 149. Her exceptions to the conviction on this complaint were sustained by the Massachusetts Supreme Judicial Court. The conviction under section 79, therefore, is not here involved.

[2] Record pp. 3-10. All references to the Record are to the original.

as amended by Statute 1939, Chapter 461, section 7 (these sections of the statute are set forth at length *infra*, pages 5-6) in that on December 18, 1941, (1) she furnished one Betty M. Simmons, a minor girl of nine years of age, certain magazines, well knowing that the said Betty M. Simmons was to sell the said magazines unlawfully; and, (2) as the custodian of the said Betty M. Simmons, a minor as aforesaid, she permitted the said Betty M. Simmons to work contrary to law.[2] Both the appellant and Betty M. Simmons were members of the sect known as Jehovah's witnesses, and they both claimed to be, as they characterized it, "ordained ministers," and the appellant testified that this was her sole occupation.[4] Betty M. Simmons was a female minor of nine years of age and the appellant was her aunt and custodian.[5] The appellant testified that on December 18, 1941, she furnished to Betty M. Simmons a "magazine bag" with certain printed magazines known as "Watchtower" and "Consolation."[6] At 8:45 P.M. on said date the appellant was with the said Betty M. Simmons on a public street in the City of Brockton, Massachusetts. Suspended from the shoulder of the said Betty M. Simmons was a "magazine bag" on which was printed the following: "Watchtower explains the Theocratic Government, 5c a copy." Copies of the magazines "Watchtower" and "Consolation" were contained in the "magazine bag," and the minor, Betty M. Simmons, held up a copy of each magazine in her hands so that people passing by could see them. At the same time she was saying: "Remedy for World Distress. . . . Read the Watchtower."[7]

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[2] Record pp. 1-2.

[4] Record pp. 11, 13, 14 *passim*.

[5] Record p. 14.

[6] Record pp. 14, 22.

[7] Record p. 15.

While the appellant and Betty M. Simmons were so employed in exposing and offering magazines for sale on the public streets of Brockton, Massachusetts, they were encountered by George S. Perkins, a school attendance officer of the said city duly charged with the enforcement of the statutes here involved.[8] He testified that on a number of occasions prior to December 18, 1941, he had told the appellant that it was against the Massachusetts law to allow minor children on the streets selling magazines;[9] that on at least one previous occasion he had explained the law in detail to the appellant;[10] that prior to such date he had given the appellant written notice of the law in question;[11] and, that these notices had been given to the appellant as the result of her earlier violations of the statutes in question in allowing and encouraging other children to be on the public streets exposing and offering for sale magazines furnished to them by her for that purpose.[12] George S. Perkins testified further that the appellant openly refused to comply with this law.[13] As a result of the violation of December 18, 1941, he made the complaints upon which this case rests.[14]

The appellant contended in the trial court that Betty M. Simmons was neither selling, exposing, nor offering for sale magazines, that the said Betty M. Simmons was not engaged in work, that any money she received in return for the magazines was in the form of a "contribution," and that the act of the said Betty M. Simmons was her form of

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[8] Record pp. 15, 16.
[9] Record p. 18.
[10] Record p. 17.
[11] Record p. 18.
[12] Record pp. 16-17.
[13] Record p. 21.
[14] Record pp. 1-2, 18.

religious worship.[15] The trial court found that Betty M. Simmons was exposing, and offering magazines for sale in the public streets, and that these magazines had been furnished to her by the appellant for that purpose. The trial court also found that the appellant knew that Betty M. Simmons was a minor of the age of nine years. The court further found that the acts of the minor, Betty M. Simmons, in exposing and offering magazines for sale constituted work within the meaning of section 81 of Massachusetts General Laws (Ter. Ed.) Chapter 149. The court found further that the said Betty M. Simmons was not "accepting contributions," but instead was offering the magazines for sale. The court specifically found that the defendant and Betty M. Simmons were not engaged in their way of worship and that there was no question of practice of religion in issue.[16] These specific findings not only are amply warranted by the evidence, but are the only findings that could properly have been made. The trial court, therefore, could not do otherwise than find that the appellant had violated sections 80 and 81 of Massachusetts General Laws (Ter. Ed.) Chapter 149.

THE STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The appellant was prosecuted under Massachusetts General Laws (Ter. Ed.) Chapter 149, sections 80 and 81, as amended by Statute 1939, Chapter 461, section 7. These sections of Chapter 149, together with that part of section 69 to which they refer, provide:

"Section 69. *Street Trades for Children Regulated.*— No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, period-

[15-16] Record pp. 9-10.

icals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place."

"Section 80. *Penalty for Furnishing Articles to Be Illegally Sold by Minors Engaged in Street Trades, or Aiding in Violation of §§ 69-73.*—Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both."

"Section 81. *Penalty on Parent or Guardian, etc.*—Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive, or knowingly certifies to any materially false statement for the purpose of obtaining the illegal employment of such minor, shall for a first offence be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days, or both; and for a subsequent offence by a fine of not less than five nor more than twenty-five dollars or by imprisonment for not more than ten days, or both."

The appellant contends that the Massachusetts statutes just quoted run *contra* to, and abridge the rights and liberties saved to her by the First and Fourteenth Amendments to the Constitution of the United States, where it is provided:

Art. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Art. XIV. Sec. 1 . . . "No state shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The appellee respectfully submits that the Massachusetts statutes set out above do not infringe upon or abridge any right or liberty made inviolable by these Amendments to the Constitution of the United States.

THE ISSUE

The issue sought to be presented by the appellant in this case is whether Massachusetts General Laws (Ter. Ed.) Chapter 149, sections 80 and 81, prohibiting, under penalty, the appellant from furnishing her minor ward, Betty M. Simmons, with magazines to be exposed or offered for sale by the said minor on the public streets of Massachusetts and prohibiting her from permitting her said minor ward so to expose and offer the same for sale on the said streets, are an unconstitutional abridgment of the liberties of freedom of speech, of the press, and of religion, protected by the First and Fourteenth Amendments to the Constitution of the United States.

SUMMARY OF ARGUMENT

I. The Massachusetts statutes in question do not fall within the prohibition of any rule heretofore laid down by this Court. The long line of decisions handed down by this Court involving members of the sect known as Jehovah's witnesses present no precedent for this case. The Massachusetts statutes, moreover, do not fall within the prohibition of any rule laid down by this Court in other decisions touching upon the liberties protected and made free of restraint by the First and Fourteenth Amendments to the Constitution of the United States.

II. The statutes in question are a valid state regulation for the preservation of public order, to promote and protect the health, safety, morals, and general welfare of the state's minor children, and their specific provisions do not offend against the constitutional guaranties of the First and Fourteenth Amendments to the Constitution of the United States. The state as *parens patriae* of its minor children is competent to lay down rules and regulations looking to the protection of the health, safety, morals and general welfare of such children. There is an inherent right of the government to restrain the freedom of the individual for the good of the social whole. In conformity with these general principles, social legislation of various types for the protection of children has been enacted in the several states. Even though such legislation may run *contra* to the parents' religious beliefs, it is not an unconstitutional interference with freedom of religion. The liberty of parents with respect to the religious belief of their children is a natural and not a civil liberty and it is only civil liberties that are protected by the Federal Constitution. The Massachusetts statutes here in question are in the nature of social legislation for the protection of minor children, and they rest upon the principle of the competency of the state as *parens patriae* to enact laws looking to the establishment of such protection. The appellant's contention that these statutes are discriminatory is without merit, since the state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. It is no more than a far-fetched extravagance or a pretense to contend that statutes such as those here involved deny any care and concern of the parent for the child's education or well-being. Duty compels us to digress for the moment to point out that for the most part the appellant's statements addressed to this Court under the guise of constitutional argument are both

vague and unsound and rest largely upon hypothetical falsities.

III. The statutes here in question do not deal with or concern in any manner or degree whatsoever the constitutional guaranties of freedom of religion, freedom of speech, or freedom of press, either by their specific provisions or through their application as construed by the Massachusetts courts; the scope and application of the statutes being strictly and solely limited to the regulation of designated activity of minor children of a specified age. Freedom of religion, as often remarked by this Court, extends only to freedom of thought and belief, not to unlimited freedom of action. The statutes do not concern freedom of religion, they merely regulate the activity of minor children. The statutes have a reasonable relation to some purpose which is within the competency of the state to control and regulate. The statutes do not concern freedom of speech or of the press. They place neither a previous, nor an absolute, nor an unrestricted restraint upon mere distribution.

ARGUMENT

I. *The Massachusetts statutes in question do not fall within the prohibition of any rule heretofore laid down by this Court.*

Sections 80 and 81 of Massachusetts General Laws (Ter. Ed.) Chapter 149, do not fall within the prohibited rules laid down by this Court in the many decisions involving members of the sect to which the appellant belongs. In *Lovell* v. *City of Griffin*, 303 U. S. 444, the ordinance involved prohibited the distribution of literature of any kind at any time, at any place, and in any manner whatsoever without a permit from the City Manager, thus striking at the very

foundation of the freedom of the press by subjecting it to license and censorship. In *Schneider* v. *State*, 308 U. S. 147, the ordinance was directed at canvassing and banned unlicensed communication of any views, or the advocacy of any cause, from door to door, subject only to the power of a police officer to determine as a censor what literature might be distributed and who might distribute it. In *Cantwell* v. *Connecticut*, 310 U. S. 296, the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether or not the cause was a religious one, and to refuse a permit if he determined it was not, thus establishing a censorship of religion. In *Jamison* v. *Texas*, 318 U. S. —, 87 L. Ed. Adv. Sheets 629, the ordinance placed an absolute prohibition on the dissemination of ideas on the public streets through the medium of handbills, at all times, at all places, and under all circumstances. In *Largent* v. *Texas*, 318 U. S. —, 87 L. Ed. Adv. Sheets 627, the ordinance established an absolute censorship of religion and of the press by making it unlawful to canvass or solicit on the streets without a permit, and making the issuance of such a permit so to canvass or solicit a matter of unrestricted discretion on the part of the permit-issuing official. In *Jones* v. *City of Opelika*, 316 U. S. 584, reversed 318 U. S. —, 87 L. Ed. Adv. Sheets 854, the ordinance was directed at canvassing and made the holding of a license, revocable at any time in the unrestrained and unreviewable discretion of the licensing commission without cause and without notice or opportunity for a hearing, a requisite for the dissemination of all printed matter. In *Murdock* v. *City of Jeannette*, 318 U. S. —, 87 L. Ed. Adv. Sheets 827, the ordinance in question imposed a flat license tax as a condition precedent to the pursuit of activities whose enjoyment is guaranteed by the First Amendment, and so constituted a "previous restraint" on the constitutional liberties

of press and religion and inevitably tended to suppress their exercise. In *Martin* v. *City of Struthers*, 318 U. S. —, 87 L. Ed. Adv. Sheets 861, the ordinance made it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the inhabitants of any residence to the door for the purpose of receiving such literature, even though such literature related to a religious cause. In *West Virginia State Board of Education* v. *Barnette*, 318 U. S. —, 87 L. Ed. Adv. Sheets 1171, the rule of the State Board of Education conditioned access to public education on making a prescribed sign and profession and at the same time coerced attendance by punishing both parent and child.

These cases go no further than to support the propositions that a state may not restrict freedom of religion, of the press, and of speech through the medium of taxation; that a state may not place an absolute restriction upon the dissemination of ideas through the medium of handbills on the public streets; that the right to exercise the constitutionally guaranteed freedoms may not be subjected to "previous restraint" through the medium of censorship by a permit-issuing official; and, that access to public education may not be conditioned on compliance with a compulsory act and profession of belief coupled with a penalty tending to enforce compliance. The Massachusetts statutes in question do not offend against any of these fundamental constitutional principles: they do not condition the right of appellant to act upon the payment of a tax; they do not place an absolute restriction on appellant's activities; they do not condition appellant's right to act upon her first having submitted to censorship of any official; and, they do not deal with access to public education. There is, however, still another and even more important distinction between the statutes here in question and those declared by this Court, in the cases discussed above, to be an un-

constitutional abridgment of the constitutionally protected civil liberties. Each of the statutes, and municipal ordinances, involved in the cases above, and struck down by this Court, was a regulatory measure: a statute or ordinance by means of which a state undertook to regulate overt activity on the part of the person proceeded against thereunder. The statutes here in question are not in any sense regulatory with respect to parents or custodians: as to parents or custodians these statutes are strictly and avowedly penal in nature.[1] To say, therefore, that the decisions in the cases mentioned above reflect upon the constitutionality of these Massachusetts statutes is to carry the extent and scope of those decisions beyond warranted limits.

Sections 80 and 81 of Massachusetts General Laws (Ter. Ed.) Chapter 149, do not fall within the prohibition of any rule laid down by this Court in other decisions cited by the appellant as touching upon the liberties protected and made free of restraint by the First and Fourteenth Amendments to the Federal Constitution. In *Meyer* v. *Nebraska*, 262 U. S. 390, the offending statute was an absolute prohibition upon the teaching of grade school children in any language other than the English language. The prohibition, therefore, was of an act which in and of itself was not shown to have any moral or physical harm upon such children. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, the effect of the offending statute was such as to deprive citizens of vested property rights without compensation, and was an arbitrary legislative prohibition having no reasonable relation to some purpose within the competency of the state to control. In *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, the ordinance dealt with the exercise of the right of assembly for the purpose of communicating

[1] This matter will be discussed in some detail below.

views; it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent "riots, disturbances or disorderly assemblage." The ordinance thus created an instrument of arbitrary suppression of opinion on public questions. In *Herndon* v. *Lowry*, 301 U. S. 242, the assailed statute was directed at the curtailment of speech and assembly for the avowed purpose of preventing acts of sedition, criminal syndicalism, and other acts aimed at the overthrow of organized government, but "as construed and applied, . . . [amounted] . . . merely to a dragnet which may enmesh anyone who agitates for a change of government" (*ibid.* p. 263) without prescribing a reasonable ascertainable standard of guilt. The rule of "clear and present danger," as announced and applied by the Court in its many decisions construing the constitutionality of such statutes, is strictly limited to cases dealing with statutes and ordinances whose direct object is the curtailment of speech and assembly in the interest of the preservation of government. *Herndon* v. *Lowry*, *supra* p. 258. These decisions, therefore, are not here in point.[1]

The decisions cited by the appellant from various state courts in support of her argument respecting the construction of the Massachusetts statutes here involved are neither in point nor applicable. The decisions of the courts of one state respecting the construction of its statutes cannot be regarded as decisive of the true construction of the statutes of another state. *Commonwealth* v. *Prince*, 1943 Mass. Adv. Sheets 233, 237, 46 N.E. (2nd) 755, 758, Record page 80.

[1] The other decisions of this court cited and relied upon by appellant's counsel as bearing upon the unconstitutionality of the type of statutes here involved are not applicable and therefore are not here discussed.

II. *The statutes in question are valid state laws for the preservation of public order, to promote and protect the health, safety, morals and general welfare of the state's minor children, and their specific provisions do not offend against the constitutional guaranties of the First and Fourteenth Amendments to the Constitution of the United States.*

The State as *parens patriae* of its minor children is competent to lay down rules and regulations looking to the protection of the health, safety, morals and general welfare of such children. In *Chesapeake & Ohio Railway Company* v. *Stapleton*, 279 U. S. 587, this Court pointed out that the states have power to forbid the employment of minors and to punish the forbidden employment. The imposition of an absolute prohibition of the employment of minors in specified trades is a familiar exercise of the protective power of state government. *Sturges & Burn Manufacturing Company* v. *Beauchamp*, 231 U. S. 320. This Court has repeatedly stated that all questions relative to the care, control and custody of minor children belong exclusively to the State. *Hammer* v. *Dagenhart*, 247 U. S. 251; *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 527. In *Fontain* v. *Ravenel*, 17 How. (U. S.) 369, 393 it was pointed out that the prerogative powers which belonged to the sovereign as *parens patriae* remain with the States. Accord, *Hoyt* v. *Sprague*, 103 U. S. 613, 634. These powers being reserved to the individual States by the Tenth Amendment to the Federal Constitution cannot be encroached upon by the Federal government. *Hammer* v. *Dagenhart*, 247 U. S 251; *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20.

There is an inherent right of the government to restrain the freedom of the individual for the good of the social whole. Cf. *United States* v. *Macintosh*, 283 U. S. 605, 619. This proposition has been stated by this Court on numerous

occasions. In *Hamilton* v. *Regents of the University of California*, 293 U. S. 245, 268, Mr. Justice Cardozo pointed out that the right of private judgment has never yet been exalted above the powers and compulsion of the agencies of organized government. In *Crowley* v. *Christensen*, 137 U. S. 86, 89, Mr. Justice Field expressed the same thought when he wrote: "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community." (Quoted with approval in *Jacobson* v. *Massachusetts*, 197 U. S. 11, at 26-27.) Mr. Chief Justice Hughes, in expressing the opinion of this Court in the case of *Cox* v. *New Hampshire*, 312 U. S. 569, 574, remarked that: "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." Such forceful expositions of a general rule of government cannot be brushed aside lightly by an individual's assertion that some unrecognized claimed natural right has been abridged by the exigencies of organized government. The interest of the separate states in preserving to their individual citizens the civil liberties made free of restraint by our Federal Constitution is the interest of their very political and organized existence. Being thus, as it is, the collective interest of the total citizenry of a state it stands far above the single individual's separate interest.

It should first of all be pointed out, however, that the liberty of parents to bring up their children in the religious beliefs of the parents is a natural and personal liberty; not a civil liberty. It would be difficult to find a better discussion of the distinction between natural and civil liberty than that given by Blackstone in his Commentaries.

"The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public." *Blackstone's Commentaries*, i. 125 (see the learned and instructive note (5) appended to this passage in Cooley's second edition).

It is civil liberty that is protected by the Federal Constitution; not the natural liberties of man. This matter has been commented upon by numerous courts and text writers. *Cf.* Hughes, C.J., in *Cox* v. *New Hampshire*, 312 U. S. 569, 574 (set out above on page 15). The Illinois court in the case of *Ferrier's Petition*, 103 Ill. 367, aptly put the matter thus:

"There are restrictions imposed upon personal liberty which spring from the helpless or dependent condition of individuals in the various relations of life, among them being those of parent and child. . . . There are well recog-

nized powers of control in each of these relations over the actions of the child . . . which may be exercised. These are legal and just restraints upon personal liberty, which the welfare of society demands, and which, where there is no abuse, entirely consist with the constitutional guarantee of liberty." *Cf.* Cooley, *Constitutional Limitations*, 339, 342.

In conformity with these general and well established principles, legislation of one type or another has been enacted in all of the states of the United States establishing limits within which a parent must keep in the control and care of his minor children. The courts of the several states are unanimous in holding that state legislation for the protection of minor children, founded upon the principle of the position of the state as *parens patriae*, is not an unconstitutional interference with the parent's freedom of religion, even though such legislation runs *contra* to a particular parent's religious beliefs. The leading case dealing with the problems raised by a parent's religious belief which runs *contra* to social legislation enacted for the protection of minor children is that of *People* v. *Pierson*, 176 N. Y. 201. In this case the defendant was indicted under a New York statute for wilful failure to furnish medical attention to his minor daughter at a time when she was seriously sick. The facts showed that the defendant's infant daughter, aged sixteen and a half months, contracted whooping cough which later developed into pneumonia resulting in death. The defendant was aware of the dangerous condition of his child but he did not send for a physician to treat her for the reason that he was a believer in Divine healing. The defendant testified that as a member of the Christian Catholic Church of Chicago he did not believe in physicians and his religious faith led him to believe that the child would get well by prayer. The court charged the jury that the defendant's belief constituted no defense to the charge made and that "no man can be permitted to set up his religious belief as a

defense to the commission of an act which is in plain violation of the law of the state." In upholding the defendant's conviction the New York Court remarked:

"The peace and safety of the state involves the protection of the lives and health of its children as well as the obedience to its laws. Full and free enjoyment of religious profession and worship is guaranteed, but acts which are not worship are not. A person cannot, under the guise of religious belief, practice polygamy and still be protected from our statutes constituting the crime of bigamy. He cannot, under the belief or profession of belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been born to him. Children when born into the world, are utterly helpless, having neither the power to care for, protect or maintain themselves. They are exposed to all the ills to which flesh is heir, and require careful nursing, and at times, when danger is present, the help of an experienced physician. But the law of nature, as well as the common law, devolves upon the parents the duty of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance and preservation, including medical attendance if necessary, and an omission to do this is a public wrong which the state, under its police powers, may prevent. The legislature is the sovereign power of the state. It may enact laws for the maintenance of order by prescribing a punishment for those who transgress." Accord, *Rex* v. *Lewis*, 6 Ont. L. Rep. 132.

In the case of *Owens* v. *State*, 6 Okla. Crim. Rep. 110, the Oklahoma Court followed the *Pierson* case and held that religious belief on the part of a parent did not constitute a defense to a prosecution for breach of a statutory duty to furnish a child with medical attendance. Likewise, the defendant's ignorance of the exigencies of the situation is immaterial in a prosecution for wilful neglect of a child. *Rex* v. *Petch*, 25 Times L. R. 401.

In *Purinton* v. *Jamrock*, 195 Mass. 187, the Massachusetts Supreme Judicial Court in commenting upon a Massa-

chusetts statute (Statute 1905, Chapter 464, section 1) which provided that minor wards of the Commonwealth should not be denied the right to be brought up in the religious beliefs of their parents, pointed out that this statute protected the *right of the child*. "The first and paramount duty is to consult the welfare of the child . . . [if the] . . . wishes of the parent as to the religious education and surroundings of the child . . . cannot be carried into effect without sacrificing what the Court sees to be for the welfare of the child, they must so far be disregarded." (Pages 199-200). In *F.* v. *F.*, (1902) 1 Ch. 688, the English Court of Chancery, in discussing an infant's right to be brought up in the religion of its parents, remarked that the welfare of the infant must first of all be regarded, and its requirements must be treated as paramount.

The Massachusetts statutes here in question are in the nature of social legislation for the protection of minor children, and they rest upon the principle of the competency of the state as *parens patriae* to enact laws looking to the establishment of such protection. And, it seems to be well settled that such statutes must be presumed to be aimed at a particular evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need. *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224, 227. The appellant's contention that these statutes are discriminatory in that they permit a parent of a child, of the prohibited age, "to allow the child to wander about aimlessly upon the streets with nothing to do without being subject to the terms of the ordinance [*sic*, statutes]" is both unsound and fanciful.[1] A state may properly direct its legislation against what it deems an ex-

[1] Our answer here is equally applicable to the *dicta* of the New Hampshire Supreme Court in the case of *Richardson* v. *State*, — N. H. —, 27 Atl. (2nd) 94, 97.

isting evil without covering the whole field of possible abuses. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Farmers and Merchants Bank etc.* v. *Federal Reserve Bank etc.*, 262 U. S. 649, 661; *James-Dickinson Farm Mortgage Co.* v. *Harry*, 273 U. S. 119; *Whitney* v. *California*, 274 U. S. 357, 370. The appellant's contention thus in effect amounts to an objection that the Massachusetts statutes establish a classification of minor children. Statutes are not open to the objection of class discrimination unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. *Stebbins* v. *Riley*, 268 U. S. 137, 143; *Graves* v. *Minnesota*, 272 U. S. 425; *Swiss Oil Corporation* v. *Shanks*, 273 U. S. 407; *Whitney* v. *California*, *supra*. Moreover, such a contention as that advanced by the appellant is an unwarranted assumption that there does not exist other legislation to suppress the supposed evils not embraced within the terms of the statutes here assailed. Likewise, the appellant's assertion that the statutes here attacked could be applied as readily against the use of altar boys *in a Church* is a deliberate attempt at confusion. The Massachusetts statutes here in question are directed at the employment of minor children in street trades and prohibit parents from sponsoring and permitting their children to so engage in street trades as was the minor Betty M. Simmons in this case. These particular statutes do not prohibit the appellant from permitting and encouraging her minor children to engage in any activity she may feel to be of a religious character in any place other than on the public streets. If, as the appellant would inferentially have this Court believe, the use of minor children in church services in a house of worship is an existing evil then her appeal should be directed to the legislature. As we remarked above, the fact that all possible and sup-

posed abuses are not embraced within a single statute is no objection to the statute. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144, and cases there cited. In the *Patsone* case a Pennsylvania statute making it unlawful for an unnaturalized foreign born resident to own or be possessed of a shotgun or rifle was upheld by this Court. Mr. Justice Holmes writing for the Court said:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 80, 81. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.' *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160. *Rosenthal* v. *New York*, 226 U. S. 260, 270. *L'Hote* v. *New Orleans*, 177 U. S. 587. See further *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36. The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. *Barrett* v. *Indiana*, 229 U. S. 26, 29."

It is no more than a far-fetched extravagance or pretense to contend that statutes such as these here involved deny any care and concern of the parent for the child's education or well being. The statutes do not either directly or indirectly diminish or infringe upon the parent's right and duty to direct his child's education and to see to his well-

being. These statutes provide measures seeking to place the common welfare of minor children on a plane higher than that which some individual parent might set. The moving consideration was that of the welfare of minor children; not what may or may not please an individual parent. A parent might feel that his child's education was neglected unless the child had learned to suffer pain through bodily mutilation, or physical abuse, and yet no one would deny to the state both the power and duty to suppress and penalize such "strange and generally unacceptable doctrines and tenets." Here it may be well for us to direct our attention for a moment to another feature of the appellant's argument.

We would be remiss in our duty if we failed to call this Court's attention to the many extravagant and pretentious statements made by appellant's counsel in appellant's "Statement as to Jurisdiction" (Typescript Record, p. 47 *et seq.*) under the guise of constitutional arguments. Statements such as these, to give only a few typical examples, illustrate the preposterous and almost unbelievable state of mind with which the simple question here presented is approached on behalf of the appellant:

"Marriage and childbearing is God's arrangement for all humankind that shall live on the earth. It is beyond the power of the state to interfere with or abridge the right of all persons within its boundary to procreate." (*ibid.*, p. 61)

"The state has no authority or power to tell a child at what age it can begin practicing the requirements of Almighty God taught it by the parent." (*ibid.*, p. 63)

"Here it cannot be denied that appellant was exercising a *federal* right secured impliedly by the United States Constitution, even as every federal employee exercises the right to perform assigned duty in public interest." (*ibid.*, p. 73)

"Since when has it become a crime in this 'Christian Nation' [*sic.*] for a little girl to say politely to her neigh-

bors, 'Remedy for world distress; read The Watchtower.'?' (*ibid.*, p. 73)

"The tendered message is irrefutably a public benefit, is of unparalleled importance in this hour of strain, rather than a public menace." (*ibid.*, p. 74)

It is almost unbelievable that statements such as these should be addressed to this Court as constitutional arguments! But, still more unbelievable is the appellant's attempt to advance as constitutional arguments their identity with the world struggle for the obliteration of despotism, and to portray their lot as that of martyrs and the position of the state as that of King Herod. The whole tenor of the appellant's argument alternates between these two contentions. But, thus it is that the song of St. Bernardette of Lourdes is one ever arising. Now as then the closing of a grotto to the adherents of a just cause is reflected in diversified groups pressing unmeritorious individual claims for recognition upon the foundation of a meritorious struggle. It is, in truth, an apish phenomenon of life, but, nevertheless, one which raises problems which must be solved. The solution to these diversified conflicts, allegedly joined by a single bond, depends not so much on one's philosophical outlook as on one's factual command. The answer certainly is not to be found in an abstract display of devotion. The whole tenor of appellant's argument is just that. It is, however, with hesitancy that we turn our attention to those portions of the appellant's argument in which they allege and assert Biblical authority in support of their contentions. Our hesitancy is born not out of a belief that the Bible supports their contention and denies our claim of the right of the state to govern individuals for the common good, but rather is it born out of our inherent conscienceness of the holiness of the teachings of that great Book and a reluctance to despoil those teachings by en-

deavoring to shield our case behind the cloak of religion. We openly assert that that is the position in which the appellant stands. Moreover, if we were to quote scriptural authority in support of our contention, we would be charged, as was the State of New Hampshire in the *Richardson* case, with: "Private misinterpretation of the scriptures." For the adherents of this sect, whose doctrines and alleged beliefs rest solely upon the "private interpretation" of one Pastor Russell and one Lawyer Rutherford, to make such a charge is an extravagant absurdity and discloses the entire foundation upon which their contentions are based: the will of organized society is a nullity if it conflicts with their own private interpretation of Biblical sources. The appellant's every effort is directed toward leaving the impression that she and members of her sect are peaceful, docile, and humble folk and that the law-enforcing agencies of the state have sought them out for assertive and aggressive attacks. No one who is familiar with the methods of Jehovah's witnesses—see the descriptive discussion by Mr. Justice Jackson in his separate opinion in *Douglas* v. *City of Jeannette*, 318 U. S. —, 87 L. Ed. Adv. Sheets 855—can fail to see the hypothetical falsities upon which the appellant's argument is based. The record in this case discloses beyond doubt the fact that the appellant's attitude was one of belligerent hostility and not that of a meek and humble martyr as she would have this Court believe. These are matters warranting open and frank discussion and we would have failed in our duty if we had not treated them here as such.

III. *The statutes here in question do not deal with or concern in any manner or degree whatsoever the constitutional guaranties of freedom of religion, freedom of speech, or freedom of press, either by their specific provisions or through their application as construed by the Massachusetts courts; the scope and application of the statutes being strictly and solely limited to the regulation of designated activity of minor children of a specified age.*

The appellant's contention that these statutes are an abridgment and denial of the constitutionally protected freedom of religion is entirely without merit. The freedom of religion protected by the Federal Constitution, as often pointed out by this Court, extends only to freedom of thought and belief, not to unlimited freedom of action. Mr. Chief Justice Waite, writing for this Court in the case of *Reynolds* v. *United States*, 98 U. S. 145, in a truly classical discussion of the question of freedom of religion under the law, remarked that "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." (*ibid.*, 166) In the case of *Davis* v. *Beason*, 133 U. S. 333, Mr. Justice Field reaffirmed this doctrine when he wrote: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation." (*ibid.*, 342-343) And, in the case of *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U. S. 1, Mr. Justice Bradley writing for the Court put the matter in a realistic fashion when he said:

"One pretence for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and, therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs

of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

"The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practised." (pp. 49-50).

In these cases this Court held that statutes prohibiting plural marriages were constitutional and that violation thereof could not be excused by reason of an asserted religious belief in plural marriages. This Court has never failed to recognize the fact that to allow absolute and unlimited individual freedom under the guise of freedom of religion would be to establish eventually an absolute freedom of individual action which would defeat the very freedoms sought to be made indestructible by our Constitution. Accordingly, religious objections to vaccination laws are not fatal to a statute calling for that kind of health protection. *Jacobson* v. *Massachusetts*, 197 U. S. 11. Conscientious scruples against bearing arms will not defeat a law imposing an oath to bear arms. *United States* v. *Macintosh*, 283 U. S. 605. Cf. *Hamilton* v. *Regents of the University of California*, 293, U. S. 245.[1] Public peace comes before uncontrolled and offensive expression of belief by a religious preacher. *Chaplinsky* v. *New Hampshire*, 317 U. S. —, 86 L. Ed. Adv. Sheets 671. Public

[1] It should be pointed out that the Federal Courts have thus far consistently refused to recognize the claim by Jehovah's witnesses that they are "ordained ministers" and as such exempt from either military duty or detention in conscientious objectors' camps.

order in the streets is superior to the absolute right of parading and preaching. *Cox* v. *New Hampshire*, 312 U. S. 569. Indeed, there can be no such thing as the absolute abstract individual freedom of man in an organized society of men. The freedom of the individual is the reflected freedom of the socially organized group. The framers of our Constitution sought to provide that no individual or group should be discriminatorily subjected to censorship or punishment merely because of his or their religious belief. They sought to do no more than that. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." Mr. Chief Justice Hughes in *Cox* v. *New Hampshire*, 312 U. S. 569, 574.

The proposition that religious belief constitutes no defense for violation of a penal statute also has been announced repeatedly by numerous courts in construing various statutes, principally the violation of statutes dealing with Sabbath breaking.[1] In *Scales* v. *State*, 47 Ark. 476, a member of the religious sect known as the Seventh Day Baptists was convicted of violation of a statute prohibiting work on Sunday. The defendant argued that because he conscientiously believed that he was permitted by the law of God to labor on Sunday he might violate with impunity a statute declaring it illegal to so do. The Supreme Court of Arkansas, in upholding the conviction of the defendant, pointed out that "a man's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the law of the land." (*ibid.*, 485) In *Knowles* v. *United States*, 170 Fed. 409, 411, this doctrine is clearly stated: "The constitutional guaranties of

[1] This Court has uniformly recognized that state Sunday laws are a legitimate exercise of state police power. *Hennington* v. *Georgia*, 163 U. S. 299; *Petit* v. *Minnesota*, 177 U. S. 164.

religious freedom and freedom of the press . . . cannot be made a shield for violation of criminal laws which are not designed to restrict religious worship or a free press." Accord, *Hiller* v. *State*, 124 Md. 385; *Silverberg Bros.* v. *Douglass*, 114 N. Y. S. 824; *State* v. *Barnes*, 22 N. D. 18; *State* v. *Hondros*, 100 S. C. 242; *Commonwealth* v. *Has*, 122 Mass. 40; *Commonwealth* v. *Anderson*, 272 Mass. 100.

In *Commonwealth* v. *Anderson*, *supra* at page 106, the Massachusetts Supreme Judicial Court pointed out:

"It is settled law that States within their constitutional right may regulate the sale, barter, or the offering for sale or barter, or the carrying for sale or barter, of goods, wares or merchandise, and impose penalties for the violation of such regulations. *Commonwealth* v. *Ober*, [12 Cush. 493]; *Emert* v. *Missouri*, [156 U. S. 296]. It is too clear for serious discussion or citation of authority that books and pamphlets, worldly or religious, are in their nature goods, wares or merchandise. Art. I of the Amendments to the Constitution of the United States and art. 11 of the Amendments to the Constitution of the Commonwealth of Massachusetts, which are relied on by the defendants, were not designed to prevent the adoption of reasonable rules and regulations concerning the sale of religious books and pamphlets, and no person, however earnest and sincere, can avail himself of those provisions as an authority to violate rules and regulations which govern the disposition by sale or otherwise of books however classified."

This Court on numerous occasions within the past few years has held that state regulations such as those here involved do not offend against the constitutional guaranties of the First and Fourteenth Amendments of the Federal Constitution. In *Cox* v. *New Hampshire*, 312 U. S. 569, this Court held that state laws providing for control of travel on the public streets in order to insure the safety and convenience of the traveling public are valid, even though they may conflict with an individual's asserted freedom of religion, of speech, and of the press. In *Chaplinsky* v. *New Hampshire*, 317 U. S. —, 86 L. Ed. Adv. Sheets 671, this

Court held that a state may punish conduct on streets which is in violation of a nondiscriminatory state law even though that conduct is alleged to be the exercise of religious freedom. This Court in *Jamison* v. *Texas*, 318 U. S. —, 87 L. Ed. Adv. Sheets 621, pointed out that "The right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances," and thereby implied that a state may validly impose reasonable limitations upon the right so to distribute; that it is only the absolute prohibition of all persons, at all times, at all places, and under all circumstances which falls within the constitutional prohibition. In *Valentine* v. *Chrestensen*, 316 U. S. 52, this Court held that a state can prohibit the use of the streets for the distribution of purely commercial leaflets, even though such leaflets may have "a civil appeal, or a moral platitude" appended.

The statutes here in question have a reasonable relation to some purpose which it is within the competency of the state to control and regulate. Cf. *Meyer* v. *Nebraska*, 262 U. S. 390, 400; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535. Considering the ends sought to be achieved by these statutes none of the provisions thereof can be said to pass the "bounds of reason and assume the character of a merely arbitrary fiat." Mr. Justice Holmes, in dissent, in *Bartels* v. *Iowa*, 262 U.S. 404, 412. Legislation of the general and nondiscriminatory type here involved would seem to fall well within the rule laid down by this Court in the case of *Cantwell* v. *Connecticut*, 310 U. S. 296.

"The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free

exercise of religion or interpose an inadmissible obstacle to its exercise." (page 305)

And, the remarks of Mr. Chief Justice Hughes in the case of *Cox* v. *New Hampshire*, 312 U. S. 569, 578, seem also equally applicable here:

"The argument as to freedom of worship is also beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions."

The provisions of Massachusetts General Laws (Ter. Ed.) Chapter 149, sections 80 and 81, as amended by Statute 1939, Chapter 461, section 7, are strictly limited, both by the specific terms thereof and by the construction placed thereupon by the Massachusetts courts, to minor children—specifically to boys under twelve and girls under eighteen. The single purpose of these statutes is to prohibit minor children of the specified ages from selling, exposing, or offering for sale newspapers, magazines, periodicals, or any other articles of merchandise of any description, or to engage in any street trade. These statutes are not directed, nor are they applied through the construction placed thereupon, toward the general prohibition of the distribution of literature or the dissemination of ideas on the public streets.

These statutes contain no trace of the objectionable "previous restraint" provisions of the many regulatory statutes of late struck down by this Court. The statutes here under attack do not contain provisions providing that minors may sell, expose or offer for sale magazines on the public streets after a public official has first passed upon the literature to be sold. These statutes could only fall within the prohibited rules heretofore laid down by this Court regarding "previous restraint" amounting to official censorship by

containing such provisions. The purpose of the statutes is not to provide for official determination of what literature may or may not be sold on the public streets but is solely directed toward conduct of minors of specified ages "regarded by general consent as properly the subjects of punitive legislation." *Davis* v. *Beason,* 133 U. S. 333, 343.

If state legislation of the type here attacked is to fall because a person professes a conscientious belief that such legislation is in conflict with the law of God, as he believes it to be, then not only will the welfare of organized society become subrogated to the will of the individual, and the state itself when so in conflict with religious dogma be reduced to impotency, but, indeed, as Mr. Chief Justice Waite remarked "every citizen under the guise of religious freedom becomes a law unto himself."

CONCLUSION

It is respectfully submitted that Massachusetts General Laws (Ter. Ed.) Chapter 149, sections 80 and 81, as amended by Statute 1939, Chapter 461, section 7, are valid state regulations passed under ample authority, and that they have a reasonable relation to some purpose which is within the competency of the state to control and regulate. Wherefore the appellee respectfully submits that the judgment of the Massachusetts courts be sustained.

Respectfully submitted,

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